

**REMARKS**

Claims 10, 16, 18 and 30-35 are pending.

Claim 10 has been amended to recite that R represents an alkyl or alkenyl group having "13 to 21 carbon" atoms. This amendment is supported by the description, page 11, line 7. Claim 10 has also been amended to recite that the plant-activating agent is in a concentration of "50 to 500 ppm." Support for the lower limit of this range is in the examples of the description. Claim 10 has also been amended to recite that X<sup>1</sup> represents an alkyl or acyl group having "1 to 22" carbon atoms or an alkenyl group having "2 to 22" carbon atoms. Support for these ranges is in at [0028] of the publication of the present application (PGPUB 2002/0039971).

In addition, claim 10 has been amended to recite that n represents an average number of moles added and is "1 to 30." Also, new claim 35 recites that n = 1. Support for the fact that n can be 1 can be found in Example A2-11.

Claim 30 has been amended to recite that R represents an alkyl or alkenyl group having "15 to 21" carbon atoms. The upper limit of amended claim 30 is supported by page 11, line 8.

New claim 32 finds support at [0073] of the publication of the present application (PGPUB 2002/0039971).

New claims 33-34 find support at [0046] of the publication of the present application (PGPUB 2002/0039971).

No new matter has been added by way of the above-amendment.

**Interview**

Applicants note with appreciation the courtesies extended by Examiner Pryor and Mr. Richter during the personal Interview on March 17, 2010. On the Interview Summary form, the Mr. Richter wrote:

A proposed amendment to claims 10 and 30, as well as new claims 32-35 were discussed. The proposed amendment to the claims will place them in condition for allowance subject to an updated search. Newly presented claims 32-35 will be evaluated for new matter and baring none, allowed.

During the Interview, the above-amendment was discussed. Further details are given below.

**Issues under 35 U.S.C. § 103(a), Obviousness**

The following rejections are pending:

- (A) Claims 10, 16, 18, 30 and 31 stand rejected under 35 U.S.C. §103(a) as being obvious over Hazen (USP 4,966,728), Welebir (Effective crop yield enhancing formulations containing fatty acids, fatty esters and calcium<sup>+2</sup>, Instrum, Anal. Foods: Recent Prog., Proc. Symp. Int. Flavor Conf., 3<sup>rd</sup>, 1983, vol. 1, pp. 339-55) and Kizke et al. (USP 3,312,542); and
- (B) Claims 10, 16, 18 and 30 stand rejected under 35 U.S.C. §103(a) as being obvious over Welebir.

Applicants respectfully traverse Rejections A and B.

As mentioned in the Interview, the present invention is patentable over the cited references since none of the cited references teach or fairly suggest the compound of Formula (II) wherein “n” is at least one, i.e., wherein the compound must have at least one “(AO)” group present. As such, a *prima facie* case of obviousness cannot be said to exist.

Furthermore, even if a *prima facie* case of obviousness were to exist (which Applicants do not concede), the presently claimed invention has unexpectedly superior properties over the closest operative embodiments of the primary reference to Hazen (of Rejection A) and Welebir (of Rejection B) which would overcome the *prima facie* case.

In order to ensure that the claimed invention is commensurate in scope with the unexpected results of the present specification and the previously filed Declaration(s), the claims have been limited so that R represents an alkyl or alkenyl group having "13 to 21 carbon" atoms, and so that the plant-activating agent is in a concentration of "50 to 500 ppm," and so that that X<sup>1</sup> represents an alkyl or acyl group having "1 to 22" carbon atoms or an alkenyl group having "2 to 22" carbon atoms.

Hazen discloses (at column 3, line 67) a lower alkanol ester of a long chain carboxylic acid. Also, Welebir discloses alkanol esters. This type of compound is tested as Comparative Example A2-6 in the instant application. Comparative Example A2-6 includes a methyl laurate, which would have R = C<sub>11</sub> alkyl and no "AO" group in Formula (II) of claim 10.

It is noted that Example A2-11 includes ethylene glycol distearate which falls within the claimed invention and would have R = C<sub>17</sub> alkyl and one "AO" group in Formula II of claim 10.

The data for the test results for Inventive Example A2-11 and Comparative Example A2-6 are given in Table A2 which is reproduced below (in part).

TABLE A2-continued

		Test result		
Plant-activating composition		Efficiency for		
	Kind	Concentration (ppm)	absorbing a fertilizer	SPAD value
A2-6	Methyl laurate (EXCEPARL ML-85) POE(20) sorbitan monooleate (RHEODOL TW-O120)	50 150	126	109
A2-11	Ethylene glycol distearate (EMANON 3201M) POE(20) sorbitan monooleate (RHEODOL TW-O120)	150 400	140	114

It is noted that Inventive Example A2-11 is superior to Comparative Example A2-6 in view of efficiency for absorbing fertilizers and SPAD values.

Applicants respectfully submit that the difference in efficiency for absorbing fertilizers and SPAD values of Inventive Example A2-11 over Comparative Example A2-6 would not be

expected by the skilled artisan, i.e., the difference would be *unexpected*. Welebir teaches alkanol esters (i.e., without an “AO” group as presently claimed). Also, Hazen discloses various ranges of alkanol esters (i.e., without an “AO” group as presently claimed). However, there is no teaching or suggestion to incorporate an “AO” group as presently claimed into the esters of Welebir or Hazen, and there is no teaching or suggestion of the improved properties derived therefrom.

It was the present inventors who surprisingly found that there is a difference in the performance based on the inclusion of at least one “AO” group for the range of R and X<sup>1</sup> groups of present claim 10. As such, even if a *prima facie* case of obviousness were to exist (which Applicants do not concede), the unexpected results would overcome the *prima facie* case. Reconsideration and withdrawal of Rejections A and B are respectfully requested.

**Non-statutory Double Patenting Rejection**

Claims 10, 16, 18, 30 and 31 are rejected on the ground of non-statutory obviousness-type double patenting as being obvious over claims 1-24 of USP No. 6,849,576. Applicants respectfully traverse the rejection.

In response, Applicants co-file herewith a Terminal Disclaimer over USP No. 6,849,576.

In legal principle, the filing of a TD simply serves the statutory function of removing the rejection of obviousness-type double patenting, and does not raise a presumption on the merits of the rejection. It is improper to view the simple expedient of "obviation" as an admission or acquiescence on the merits. *Ortho Pharmaceutical Corp. v. Smith*, 22 USPQ2d 1119, 1124 (Fed. Cir. 1992) citing *Quad Env'l. Technologies Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 874, 20 USPQ2d 1392, 1394-95 (Fed. Cir. 1991).

Based on the foregoing, the obviousness-type double patenting rejection is rendered **moot**.

Conclusion

In view of the above amendment, applicant believes the pending application is in condition for allowance.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Garth M. Dahlen, Ph.D., Esq. Reg. No. 43,575 at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.17; particularly, extension of time fees.

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Respectfully submitted,

By   
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Enclosed: Terminal Disclaimer over USP No. 6,849,576